No. 12880

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

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The National Labor Relations Board respectfully petitions the Court for a rehearing of the Court's decision entered on February 29, 1952.

The Court set aside as arbitrary and capricious "so much of the [Board's] order as requires Hewes' reinstatement * * *." The order in this respect required respondent to offer Hewes reinstatement and to make him whole for any loss of pay caused by his discriminatory discharge from the date of his discharge to the date of respondent's offer of reinstatement.

The Court's decision is bottomed upon the ground that since respondent discharged Hewes prior to any announcement by the Board that it would no longer, as it had in the past, adhere to its administrative

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policy of declining to assert jurisdiction over employers in the construction industry, the Board's order worked upon respondent, who was "innocent of any conscious violation of the act, and who was unable to know, when it acted that it was guilty of any conduct of which the Board would take cognizance," a "hardship altogether out of proportion to the public ends to be accomplished."

We believe that, consistent with the views expressed by the Court, the reinstatement and back pay order should have been enforced, limited however to the period from either the date on which the Board first announced that it would assert jurisdiction over employers in the construction industry or the date on which the complaint herein was issued against respondent. The order, so modified, we submit, would be both appropriate and equitable.

As the Court noted in its opinion, the Board's first official pronouncement that it would no longer abstain from asserting jurisdiction over employers in the construction industry was made in *Ozark Dam Constructors,* 77 N. L. R. B. 1136, which was decided on June 11, 1948, approximately four months after the discharge of Hewes. The complaint against respondent, alleging that respondent unlawfully discharged Hewes on February 15, 1948, and had since that date unlawfully refused to reinstate him, was issued on September 28, 1948 (R. 6–12). Respondent was thus put on notice either on June 11, 1948 or September 28, 1948, that the Board would no longer adhere to its administrative policy of abstention but would assert jurisdiction over employers in the con-

struction industry. In these circumstances, we submit that here, as in the *Baltimore Transit* case, cited with apparent approval by this Court, "there is nothing unreasonable in requiring the company to undo the effect of unfair labor practices allowed to continue" after respondent had notice that it would no longer enjoy administrative immunity from the sanctions of the Act. *N. L. R. B.* v. *Baltimore Transit Co.,* 140 F. 2d 51, 55 (C. A. 4), certiorari denied, 321 U. S. 795, enforcing 77 N. L. R. B. 109, 112, 113. On this basis, we submit the only limitation that should be put upon the order is to make it operative from and after the date that respondent had notice of the change in the Board's administrative policy, either the date of its decision in the *Ozark Dam Constructors* case or the date of the issuance of the complaint. Such a limitation avoids the inequity or hardship of "retroactive policy making" upon an employer "who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance * * *."

Moreover, the order, as so modified, would give recognition to the inherent equities of the instant case. As between Hewes, who was discriminatorily discharged in violation of the Act and respondent who, howsoever unwittingly, unlawfully terminated his employment, the financial loss, at least from the date respondent had notice of the Board's change of policy, should be borne by respondent who committed the illegal act rather than by Hewes whose statutory rights were invaded. Cf. *N. L. R. B.* v. *Don Juan,* 185 F. 2d 393, 394 (C. A. 2).

Enforcement of the order, modified as here suggested, avoids, we believe, "the rigidities of an either-or rule" and conforms with the Congressional mandate with respect to reinstatement and back pay orders "to attain just results in diverse, complicated situations." *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 199.

For these reasons, it is respectfully submitted that this petition for rehearing be granted limited to the issue raised herein, and that upon such rehearing, the Court enter a decree enforcing the reinstatement and back pay provisions of the Board's order with the qualification stated above.

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MARCH 1952.

CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, that in his judgment it is well founded and that it is not interposed for delay.

A. NORMAN SOMERS,
National Labor Relations Board.

WASHINGTON, D. C., *March 14, 1952.*

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